Supreme Court, U.S.
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No. 03-1594

IN THE

Supreme Court of the United States

RICHARD J. ANGELICO, M.D.

Petitioner

V.

LEHIGH VALLEY HOSPITAL, INC.

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The decision of the Third Circuit should not be allowed to stand because it 1) improperly and incorrectly suggests that the immunity provisions of the Health Care Quality Improvement Act permit a District Court in a jury trial to withhold from jury consideration the factual questions needed to determine whether or not the requirements for immunity have been met by a health care entity, then decide the issues on its own on post-trial motion; and 2) it affirms a District Court Order which grants "immunity from suit," which even Respondent admits is not available under the Act.

Respondent's Brief in Opposition asks this Court to deny the Petition on the grounds that 1) the issues before this Court were not raised in the Court below; 2) there is no conflict in the Courts of Appeal regarding the ultimate determination of HCQIA immunity; 3) the District Court was "within his authority" to grant immunity on a post-trial FRCP 60(b) motion; and 4) the Order declaring Respondent "immune from suit" is merely a question of "semantics."

Far from asserting grounds to deny the Petition, Respondent has eloquently demonstrated the confusion associated with the immunity provisions of HCQIA, the implementation of which determines the fate of hundreds, if not thousands, of physicians annually.

II. REASONS FOR GRANTING THE PETITION

1. THE ISSUES BEFORE THIS COURT WERE PROPERLY BEFORE THE COURT BELOW

This Court has long held that "[a]ny issue 'pressed or passed upon below' by a federal court, *United States* v. *Williams*, 504 U.S. 36, 41, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992) (internal quotation marks omitted), is subject to

this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Communications Inc., et al v. FCC, et al,* 535 U.S. 467, 530 (2002).

> Respondents argue that this issue was not raised below... It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099, n. 8; 115 L. Ed. 2d 929; 111 S. Ct. 2749 (1991) (citations omitted; internal quotation marks omitted)

Respondent has charged "the Petitioner in the case at bar has failed to carry his burden of showing that the claims he raises here were properly presented to the Court below." (Respondent's Brief in Opposition, p.13). This puzzling statement immediately follows a cite to Petitioner's principle brief to the Court below which argued that the District Court's grant of immunity "represents a manifest error of law." (Id.). It further omits the fact that the crucial questions before this Court were not only "passed on" by the Court below, but pressed to it:

> The District Court, conceding to the argument of counsel for Lehigh Valley that it was not a legitimate trial issue, did not permit the validity of that Data Bank entry be put to the Jury (T.T. 3-13-01, pp. 249-254). (Appellant's Petition For Panel Rehearing, Jan. 26, 2004, p.11)

> ...This Honorable Court is petitioned, however, to review not only the verdict slip, but the jury charge in this case (Charge 3-15-01). The fact that is eminently clear is that the 99 pages of that charge contain not one word about the issues presently before this Court. The peer- review process conducted by LVH is nowhere addressed, nor any of the underlying factual issues relating to it mentioned... The District Court granted LVH the extraordinary relief of immunity as a matter of law

> following a jury verdict which in no way addressed the applicable issues, far less the provisions of 42 U.S.C.§11112(a). It is unclear by the order what standard he applied in doing so. But whether it was summary judgment, *Brader*, 167 F. 3d 832, 839, directed verdict, *Gay v. Petsock*, 917 F.2d 768, 771 (3d Cir. 1990), or J.M.O.L. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993), the legal standard would be the same and improperly applied.(FN 7) It is respectfully submitted that the panel has erred in deciding the Court below acted within its "discretion."
>
> (FN 7 - Petitioner has found no precedent for a grant of immunity under Fed.R.Civ.Proc.(60)
>
> (Id., p.13)

As authority for its contention that this Court may not consider the questions before it, Respondent relies on *Adams v. Robertson*, 520 U.S. 83 (1987). (Brief in Opposition, p.13). In *Adams* this Court dismissed a writ of certiorari to a state Supreme Court as improvidently granted where petitioner failed to comply with Supreme Court Rule 14.1(g)(i), holding:

> in reviewing state court judgments under 28 USCS 1257, that the Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision which the Supreme Court has been asked to review. 520 U.S., at 87.

"Where certiorari is sought to a state court, 'due regard for the appropriate relationship of this Court to state courts,' *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 84 L. Ed. 849, 60 S. Ct. 670 (1940), may suggest greater restraint in applying our 'pressed or passed upon' rule." *U.S. v. Williams*, 504 U.S. 36, n.5 (1992).

Respondent's argument is entirely without foundation and inapplicable to this matter.

2. THE DISAGREEMENT AMONG THE COURTS OF APPEALS ON THE ULTIMATE DETERMINATION OF HCQIA IMMUNITY IN A JURY TRIAL IS MORE THAN IMPLIED, IT IS STATED

Respondent directs this Court to the argument it presented to the District Court in seeking immunity under HCQIA by Fed. R. Civ. Proc. 60(b) motion, which the District Court granted (Pet. App. p.2) and the Court Below affirmed (Pet. App. p. 9). As its authority for the request it cites the 11th Circuit: " '[u]nder no circumstances should the ultimate issue [of Health Care Quality Act Immunity] be submitted to the jury.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-1333 (11th Cir. 1994)." (Brief in Opposition, p. 16)

Respondent expounds a theory, embraced by the District Court in this matter and tacitly approved by the Third Circuit by its affirmation, which allows it to make the following statement:

> The Petitioner seems to be arguing that Singh stands for the proposition that the jury has a right to determine whether a factual basis exists for grant of immunity under the Health Care Quality Improvement Act. Singh does not stand for any such proposition.
>
> (Brief in Opposition, p. 14)

However, what the First Circuit in fact said on this matter in rejecting Bryan is:

> [T]he only example Bryan gives of a "disputed subsidiary issue[] of fact" is a HCQIA immunity determination itself: "If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories." *Bryan*, 33 F.3d 1318 (emphasis added) (citations omitted). This query is almost identical to the

third HCQIA standard. See 42 U.S.C. § 11112(a)(3) (denying immunity if peer review board fails to give physician "adequate notice and hearing procedures"). Given Bryan's internal inconsistency, and its contradiction of the other circuits' holding that a jury may in principle make a HCQIA immunity determination, we decline to adopt its designation of HCQIA immunity determinations as pure questions of law off limits to a jury. *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc*, 308 F.3d 25, n7 (2002).

3. THE USE OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) TO OBTAIN IMMUNITY UNDER HCQIA IS UNPRECEDENTED AND INCONSISTENT WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE RULE

Petitioner's position on the use of Fed. R. Civ. Proc. 60(b) to seek and obtain immunity under HCQIA is fully briefed in his Petition to this Court. Respondent's statement that "[t]he District Court was within its authority to grant a post-trial motion for a finding of immunity under the Health Care Quality Improvement Act" (Brief in Opposition, p.15) and its subsequent explanation for that statement neither addresses this issue nor cites a single authority which would support such action.

Instead, Respondent proposes that the rationale for the District Court withholding any "disputed subsidiary issues of fact pertinent to the immunity" (Id., p. 16) from the jury was that "[t]here are no genuine issues of fact." (Id., p. 17); and that the District Court found "as a question of law" that deposition transcripts do not comprise witness testimony but are merely "documents"(Id.), in an apparent allusion to the confrontation requirement of 42 U.S.C. § 11112(b)(3)(c)(iii).

It is submitted that there is no such finding of law in the record of this case; had there been, this Honorable Court would have an additional question for review before it.

Without belaboring the underlying facts at issue, "testimony" is defined as "evidence given by a competent witness under oath or affirmation." Black's Law Dictionary 1476 (6th ed. 1990). *U.S. v. Salerno*, 505 U.S. 317, 322 (1992) citing Fed. R. Evid. 804(b)(1) (defining former testimony as: "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law..." *Id.*, n.1.

4. THE DISTINCTION BETWEEN "IMMUNE FROM DAMAGES" AND "IMMUNE FROM SUIT" IS NOT A "QUESTION OF SEMANTICS"

The language of HCQIA does not provide for immunity from suit. Section 11111(a)(1) provides that if a professional review action meets the required reasonableness and due process standards, the peer review participants "shall not be liable in damages." 42 U.S.C. § 11111(a)(1). All Courts of Appeals that have considered the question, save the Court below in the instant action, have held that HCQIA does not afford "immunity from suit." *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433, 435 (10th Cir.1992); *Manion v.Evans*, 986 F.2d 1036, 1042 (6th Cir. 1993); *Singh*, 308 F. 3d 25, 44; *Bryan*, 33 F. 3d 1318, 1382; *Imperial v. Suburban Hosp. Ass'n*, 37 F. 3d 1026, 1031 (4th Cir. 1994).

The District Court declared Lehigh Valley Hospital "immune from suit" (Pet. App. p.2) which was affirmed by the Court below. Respondent is well aware that that ruling, if not reversed by this Court, will have full *res judicata* effect precluding any attempt to challenge the moniker it has placed on Petitioner with its Data Bank entry, which is, indeed, the very reason it sought immunity following its success at trial.

Petitioner did not "create a phantom issue for this Court to consider" nor is this merely a question of "semantics."(Brief in Opposition, p.17)

While Respondent may claim the District Court ruling "does not suggest that it had fundamentally ignored legal

principles otherwise uniformly held," (Id.) it confirms just that; and, standing alone, warrants reversal by this Court.

5. WHILE THERE IS NO CONCENSUS AMONG COURTS OF APPEALS ON THE ROLE FOR A JURY IN THE ULTIMATE DETERMINATION OF QUALIFIED IMMUNITY, THE FACTUAL BASIS FOR THAT DETERMINATION MAY NOT BE PROPERLY WITHHELD FROM JURY CONSIDERATION

The qualified immunity under HCQIA is distinguishable from other forms of qualified immunity in that its language does not afford immunity "not to stand trial." Hence, in any analysis of its applicability it must be recognized that it represents a different entity from one where submission of the matter to trial by jury would render claimed rights "irretrievably lost." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 872 (1994). Indeed, in those cases this Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stages of litigation. *Anderson v. Creighton*, 483 U.S. 635, 646, n.6, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991); *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, at 2156 (2001). HCQIA is not absolute immunity, where entitlement is without regard to the underlying facts. *Brown v. Presbyterian Healthcare Servs.*, 101 F. 3d 1318, n.9 (10th Cir. 1996) cert. den. 514 U.S. 1019 (1995).

Because of its factual nature, qualified immunity is a hybrid form of immunity that presents unique challenges in formulating a meaningful procedural device for its resolution. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U.L. Rev. 1 (1997).

In *Hunter* this Court observed that the issue of immunity should not be routinely submitted to the jury. 502 U.S. at 228. However, the Court did not address the procedure for

deciding the immunity question when the existence of disputed issues of fact precludes disposition on summary judgment.

There is general consensus among all Courts of Appeals on the prohibition of deciding immunity in the presence of disputed historical facts. *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997); *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998); *Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir. 1997); *Knussman v. Maryland*, 272 F.3d 625, 634 (4th Cir. 2001); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002); *Williams v. Pollard*, 44 F.3d 433, 435 (6th Cir. 1995); *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002); *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002); *Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991); *Cottrell v. Caldwell*, 85 F.3d 1480, 1487-1488 (11th Cir. 1996); *Kimberlin v. Quinlan*, 339 U.S. App. D.C. 283, 199 F.3d 496, 502 (D.C. Cir. 1999).

There is disagreement among the Circuits on whether the ultimate determination of qualified immunity is for the judge or jury to decide. *Swain v. Spinney*, 117 F.3d 1,10 (1st Cir. 1997) (noting that "the ultimate question of whether a reasonable police officer . . . could have believed his actions were in accord with constitutional rights is a question of law, subject to resolution by the judge [and] not the jury"); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996) (noting that "qualified immunity is a legal issue to be decided by the court" and that "jury interrogatories[for disputed factual issues] should not even mention the term"); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) (stating that the issue of qualified immunity is "a question of law for the court, not a jury question").

However, as noted by the Court below, "other circuits have endorsed an approach that permits a jury to evaluate the objective reasonableness of a defendant's conduct once the participation of a jury has already become necessary for the resolution of disputed factual issues." *Curley v. Klem*, 298 F.

3d 271, 278 (3d Cir. 2002), citing: *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (finding no error in instructions charging the jury to consider, in a qualified immunity case, whether the defendant's use of deadly force had been objectively reasonable); *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000) (stating that, if the qualified immunity issue is not decided until trial, it "goes to the jury which must then determine the objective reasonableness of the officers' conduct"); *Ortega v. O'Conner*, 146 F.3d 1149, 1156 (9th Cir. 1998) (finding that a district court's submission of the objective reasonableness question to the jury "constituted an appropriate and proper instruction"); *Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994) (holding that a district court "should have let the jury . . . decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law ...").

What is consistent, however, in each and every one of these cases is that, regardless of who ultimately determines immunity, in a jury trial the facts necessary for that determination are for the jury to decide.

The "presumption" under HCQIA in favor of the health care entity determines the initial barrier at summary judgment stage a plaintiff must overcome before the matter may go to trial.

> The statutory presumption at issue here simply adds another element to the plaintiff's case, and hence another issue to be "made as prescribed [before] the right of trial by jury accrues." *Singh*, 308 F.3d 25, n.6 (citing *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320, 47 L. Ed. 194, 23 S. Ct.120 (1902)). "The issue made as prescribed, the right of trial by jury accrues." *Id.*

Petitioner has repeatedly overcome that barrier and rebutted the presumption. *Angelico v. LVH et. al.*, 2000 U.S. Lexis 18415, Dec. 7, 2000; *Angelico v.* LVH, Court of Common

Pleas of Pennsylvania, CD 1999 (May 25, 2000, slip op.); *Angelico v. LVH et. al.*, 184 F. 3d 268 (3d Cir. 1999).

Respondent sought and was granted by the District Court the withholding from jury consideration the factual questions necessary to determine the validity of a Data Bank entry and, ultimately, immunity under HCQIA (T.T. 3-13-01 pp. 249-254, T.T. 3-14-01 pp. 6-10, Pet. App. pp.91-98). It now seeks to justify what it must realize is an egregious departure from normal judicial procedure, tacitly sanctioned by the Court below, by making the ludicrous argument to this Court that "[t]here are no genuine issues of fact." (Brief in Opposition, p.17).

III. CONCLUSION

Respondent hospital alone entails a network of nearly 1000 physicians, many of whom become the subject of peer-review annually. This unfortunate reality is repeated at thousands of hospitals nationally. The broad protections afforded a health care entity under HCQIA clearly invites the potential for abuse. The consequences for physicians who may suffer such abuse, or merely become victims of good faith misapprehension of the due process requirements under HCQIA, require this Honorable Court to use its supervisory authority to impart much needed clarity on its proper implementation.

Respondent's Brief in Opposition, far from presenting cogent arguments to deny the petition, is chilling in its demonstration of the need to grant it. Indeed, Petitioner respectfully suggests that sufficient record is now already before this Honorable Court to warrant summary reversal.

Respectfully Submitted,
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